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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Plaintiff,

against

JOHN GREGORY CROZIER,

Defendant,

JOSEPH V. ZUMBO,

Witness-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND FOR A STAY PURSUANT TO TITLE 28 U.S.C. SECTION 2101(f)

Petition for Writ of Certiorari and for a Stay Pursuant to Title 28 U.S.C. Section 2101(f)

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Questions Presented

Whether the appeal of an order directing a witness to testify pursuant to Title 18 U.S.C. Sections 6002 and 6003 is moot if the witness testifies prior to the appeal being heard in order to purge himself of a contempt order and avoid incarceration where the Witness-Appellant's motion for a stay of the Trial Court proceedings was denied by the Trial Court, the Court of Appeals and the Supreme Court and where the Witness has been subpoenaed in another trial involving the same facts and testimony.

Whether an order compelling an attorney-witness' testimony under a grant of immunity under Title 18 U.S.C. Sections 6002 and 6003 is coextensive with his right to silence under the Fifth and Fourteenth Amendments to the Constitution of the United States, *Spevack v. Klein,* 385 U.S. 511 (1967), and its progeny, or violates the attorney-witness' Constitutional right to silence.

Should this Court grant a stay pending its decision on certiorari review pursuant to Title 28 U.S.C. Section 2101(f)?

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991.

UNITED STATES OF AMERICA,

Plaintiff,

against

JOHN GREGORY CROZIER,

Defendant,

JOSEPH V. ZUMBO,

Witness-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND FOR A STAY PURSUANT TO TITLE 28 U.S.C. SECTION 2101(f)

Petition for Writ of Certiorari and for a Stay Pursuant to Title 28 U.S.C. Section 2101(f)

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

JOSEPH V. ZUMBO, Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this matter

on January 24, 1992 and issue a stay pursuant to Title 28 U.S.C. Section 2101(f) pending the outcome on certiorari review.

Opinions Below

The order of the Court of Appeals, whose judgment is herein sought to be reviewed, is unreported and a copy is attached in the Appendix at page "A-1". The United States District Court for the Northern District of New York has rendered an opinion in this matter, a copy of which is attached in the Appendix at page "A-4". This opinion is not reported.

Jurisdiction

The order of the Court of Appeals was entered January 24, 1992. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. Section 1254(1).

Constitutional and Statutory Provisions Involved

This case involves Article III, Section 2 of the United States Constitution, the Fifth Amendment and the first section of the Fourteenth Amendment to the Constitution of the United States, Title 18, Sections 6002 and 6003, and Title 28, Sections 1826(a) and 2101(f) of the United States Code, which provide as follows:

ARTICLE III

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime

Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived

from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Section 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceedings is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General or any designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Section 1826. Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

Section 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such

writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

Statement of the Case

The instant action is a Federal criminal case brought, *inter alia*, pursuant to Title 18 U.S.C. Sections 371 and 666, in which the Petitioner was called as a witness and compelled to testify over his assertion of his right to silence pursuant to the Fifth and Fourteenth Amendments to the Constitution of the United States. He has again been subpoenaed to testify at trial on May 11, 1992.

Joseph V. Zumbo, the Petitioner, is an attorney in the State of New York. The Government subpoenaed Mr. Zumbo to testify in the instant cause of action involving charges against the Defendant, John Gregory Crozier. The indictment returned against the Defendant alleges a conspiracy to bribe and the transfer of a bribe to the former Albany County Executive James Coyne. The Petitioner was named as an unindicted co-conspirator of the Defendant.

During the investigation of the Defendant, Mr. Zumbo testified before the Grand Jury on several occasions pursuant to an immunity agreement with the Government. Prior to the commencement of the trial in the above-captioned matter, the Government declared the immunity agreement in breach and indicted the Petitioner on two counts of perjury and one count of giving false information in connection with that separate proceeding.

Although this Court held in *Spevack v. Klein*, 385 U.S. 511 (1967), that the Fifth Amendment's right to silence applies in

State disciplinary proceedings involving an attorney's license to practice law, it is well established in New York that compelled, immunized testimony is admissible in such proceedings. Thus, at trial, Mr. Zumbo chose to invoke his right to silence embodied in the Fifth and the Fourteenth Amendments to the United States Constitution, as he would be entitled to do at a disciplinary proceeding involving his license to practice law. Pursuant to a pretrial order dated and sealed November 27, 1991, and unsealed at trial on December 9, 1991, the District Court granted Joseph Zumbo immunity for his testimony under Title 18 U.S.C. Sections 6002 and 6003. (A copy of the order is attached in the Appendix at page "A-18".)

Prior to being called to testify at trial, and in anticipation of being granted immunity, Petitioner made a motion seeking a protective order prohibiting his compelled testimony or, in the alternative, for an order denying the Government's application for an order compelling his testimony under Title 18. (A copy of the motion papers are attached in the Appendix at page "A-21".) The basis of this motion was that since immunized testimony is admissible in State disciplinary proceedings, any immunity conferred by the District Court would not be coextensive with Mr. Zumbo's Fifth and Fourteenth Amendment rights.

The Hon. Con. G. Cholakis, Judge of the United States District Court for the Northern District of New York, denied the motion, finding the immunity to be coextensive. (A copy of the Memorandum Decision and Order dated December 6, 1991 is attached in the Appendix at page "A-4".) On appeal, the Court of Appeals for the Second Circuit denied Petitioner's motions for a stay and protective order, and ruled that the validity of the District Court's order may be tested on appeal from adjudication of contempt. (A copy of the Order of the Court of Appeals is attached in the Appendix at page "A-7".)

Thereafter, when the above-described order granting immunity was unsealed at trial on December 9, 1991, the Petitioner asserted his right to silence and refused to testify. The District Court then held Mr. Zumbo in contempt and ordered incarceration, staying enforcement of the contempt order for two days until December 11, 1991, to allow Petitioner time to appeal or purge himself of the contempt. (The December 9, 1991 order was made orally by the Court. A copy of the relevant portion of the transcript containing the order is attached in the Appendix at page "A-8".)

On December 9, 1991, the Petitioner filed a notice of appeal from the orders of District Court Judge Con. G. Cholakis dated November 27, 1991 and December 9, 1991 with the Clerk of the Northern District of New York. (A copy of the December 9, 1991 Notice of Appeal is attached in the Appendix at page "A-23".) By an order dated December 10, 1991, the Court of Appeals for the Second Circuit granted Mr. Zumbo's motion for an expedited appeal, but refused to stay the lower court proceedings pending the outcome of the appeal. (A copy of this order is attached in the Appendix at page "A-12".) The Petitioner then sought a stay of the District Court proceedings from the Supreme Court. That application was also denied. (A copy of the Supreme Court's Order is attached in the Appendix at page "A-16".) The Second Circuit scheduled argument in the appeal for the week of January 13, 1992.

Meanwhile, on December 11, 1991, the Petitioner resumed the witness stand. Faced with the "choice" of jail or abandonment of his Fifth and Fourteenth Amendment privileges, and absent a stay from the Second Circuit or from this Court, the Petitioner was compelled to testify.

The trial of John Gregory Crozier concluded on December 20, 1991. On December 13, 1991, after Petitioner had completed his testimony, the Government made a motion to the Second Circuit to dismiss Petitioner's appeal on the ground that it was moot. (A copy of the motion is attached in the Appendix at page "A-25".) The Second Circuit heard oral argument in this case on January 16, 1992. On January 24, 1992, the Court granted the Government's motion and dismissed the appeal as moot. (A copy of the Court of Appeals' Order is attached in the Appendix at page "A-1".)

On March 19, 1992, the Government subpoenaed the Petitioner to testify in the upcoming trial of James Coyne regarding exactly the same transactions proved in the Crozier trial. (A copy of the subpoena is attached in the Appendix at page "A-28".)

REASONS FOR GRANTING THE WRIT

I.

The questions presented are not moot

It is well established that the jurisdiction of the Supreme Court under Article III, Section Two, of the United States Constitution extends only to actual cases and controversies in existence during appellate or certiorari review. *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950); *Indiana School Commissioners v. Jacobs*, 420 U.S. 128 (1975); *Sosna v. Iowa*, 419 U.S. 393 (1975).

One recognized and relevant example of the application of the mootness guidelines occurs with respect to judgments of civil contempt. The judgment becomes moot once the con-

tempt has been purged because such compliance with the Court's order eliminates any case or controversy. *Marshall v. Whittaker Corp.*, 610 F.2d 1141 (3d Cir. 1979).

Several exceptions to the mootness doctrine have evolved, the most venerable of which is where an otherwise moot issue may be reviewed if it is "capable of repetition, yet evading review." *Southern Pacific Terminal Company v. I.C.C.*, 219 U.S. 393 (1911); *Moore v. Ogilvie*, 393 U.S. 403 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); *Sosna v. Iowa*, 419 U.S. 393 (1975). The Supreme Court has established a two-part test for this exception to the mootness doctrine. First, the Petitioner must show that, "[T]he challenged action was in its duration too short to be fully litigated prior to its assertion or expiration" and second, "there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982), *citing*, *Weinstein v. Bradford*, 423 U.S. 147 (1975); *Sosna v. Iowa*, 419 U.S. 393 (1975).

Under the first prong of this test, a petitioner must demonstrate that due to the nature of the action involved, the internal clock of the subject action will necessarily stop prior to the perfection of an appeal to this Court. Thus, the Supreme Court has recognized specific "internal clocks" which meet this test, such as the normal two hundred and sixty-six day period of human gestation and short-term residency requirements. *Roe, supra; Sosna, supra* (respectively) Another such exception is where an appeal is taken from a "short-lived" order. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 547 (1976).

The *Nebraska Press Association* case involved a "gag" order restraining the news media from reporting or printing prejudicial facts concerning the accused in a pending murder trial prior to impaneling the jury. Thus, the order's internal clock stopped running once the jury was selected. In the

decision granting certiorari, this Court stated, "Yet if we decline to address the issue in this case on the grounds of mootness, the dispute will evade review, or at least considered plenary review in this Court, since these orders are by nature short-lived." *Id.*

The civil contempt order in the case at bar falls squarely within this category. A civil contempt order pursuant to Title 28 U.S.C. Section 1826 cannot exceed the life of the Court proceeding or the term of the Grand Jury. In the case at bar, the trial lasted less than one month.

The second prong of this test is to determine whether the controversy in question is capable of repetition. Although the underlying dispute in the *Nebraska Press Association* case had ended by the time it was reviewed by the Supreme Court, the Court found two bases on which it might be capable of repetition. First, this Court found that reversal by the Nebraska Supreme Court may necessitate a new trial in which an identical order may again be issued; second, since the State was a party, the decisions in this case authorize its prosecutors to seek the same type of order in any appropriate future case. *Nebraska Press Association, supra* at 546-47.

The United States Court of Appeals for the Third Circuit held, under analogous facts, that an appeal from a district court order holding a witness in contempt for refusing to testify was not moot because the witness faced being subpoenaed to give the same or similar testimony in a subsequent criminal proceeding. *United States v. Frumento,* 852 F.2d 534 (3d Cir. 1977). In *Frumento,* a defendant, Vito Pisciotta, who had already been tried and convicted, but not yet sentenced, was subpoenaed to testify at the trial of his co-defendants. Upon being called to the stand, Pisciotta asserted his Fifth Amendment right and refused to testify. Pisciotta was then given immunity pursuant to Title 18 U.S.C. Section 6002.

Pisciotta again refused to testify and was held in contempt of Court pursuant to Title 18 U.S.C. Section 1826. The District Court ordered him to be confined until the trial terminated or he purged himself of the contempt. *Id.* at 535-36.

Pisciotta immediately sought a stay of the contempt order. The stay was denied. He then filed a notice of appeal and sought a stay pending the outcome on appeal. Leave to appeal was granted, but the stay was denied. By the time the direct appeal was before the Court of Appeals, the case involving Pisciotta's co-defendants had ended. On appeal, the Government contended that the appeal was moot since the contempt order had terminated at the end of the trial and the petitioner had been released from custody. *Id.*

The Court found that this controversy met the "evading review" portion of the test since it was a short-lived order. It then discussed the second part of the test with which we are now concerned. In finding the dispute in *Frumento* capable of repetition, the Court stated:

> [W]e perceive no difference between Pisciotta's exposure to future grand jury or court proceedings and the circumstances foreseen by the Supreme Court in *Nebraska Press* in the event a new trial was ordered and a new gag order imposed. Indeed, we need not speculate with respect to Pisciotta's future grand jury involvements, for the government had already subpoenaed Pisciotta once to give grand jury testimony, and has indicated an intention to call him again. Further we are mindful that appeals may be taken by Pisciotta's co-defendants, which may result in new trial proceedings at which Pisciotta's testimony will be required. Hence the circumstances giving rise to Pisciotta's confinement are at least as "capable of repetition" as those circumstances which have satisfied the Supreme

> Court's mootness requirements in cases involving other interests.

United States v. Frumento, 552 F.2d at 540 (1970).

In the instant case, Joseph V. Zumbo was subpoenaed to testify in a trial in which he had been named as an unindicted co-conspirator. Here, Petitioner also vigorously pursued all avenues of appellate review, including filing a motion and an appeal from the ensuing order *prior* to being called to testify and then appealing the relevant Court orders granting immunity and finding Petitioner in contempt on the day they were issued. Although Petitioner was granted leave to appeal, neither the Court of Appeals nor this Court would grant a stay of proceedings. Thus, Petitioner testified to purge himself of contempt and avoid incarceration.

Further, pursuant to a subpoena dated March 16, 1992, Joseph Zumbo has been called to testify in the trial of James Coyne concerning the same facts and transactions as those testified to in the instant case, removing any speculation as to whether the dispute will repeat itself. *See, Frumento, supra.* The further possibility of repetition exists since the December 20, 1991 guilty verdict against the Defendant John Gregory Crozier has been appealed and a new trial is possible. *See, Nebraska Press Association, supra; Frumento, supra.*

The facts herein clearly present this Court with a case or controversy capable of repetition, yet evading review. Ignoring this principle, however, the Second Circuit Court of Appeals simply dismissed the case and Petitioner's Constitutional rights as moot without opinion. The Supreme Court now has the opportunity to correct the Court of Appeals' error and rectify the injustice presented in this Petition.

II.

Under existing New York law, a grant of immunity pursuant to Title 18 U.S.C. Sections 6002 and 6003 is not coextensive with an attorney-witness' right to silence under the Fifth and Fourteenth Amendments to the United States Constitution

The Fifth Amendment to the Federal Constitution "guarantees against Federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan,* 378 U.S. 1 (1964). The absorption of the Fifth Anendment into the Fourteenth Amendment to the Federal Constitution makes this right available in State actions as well. *Id.*

> In this context "penalty" is not restricted to fine or imprisonment. It means . . . the imposition of any sanction which makes assertion of the Fifth Amendment privilege "costly." (cites omitted) . . . The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege. That threat is indeed as powerful an instrument of compulsion as "the use of legal process to force from the lips of the accused individual the evidence necessary to convict him . . ." *United States v. White,* 322 U.S. 694, 698.

Spevack v. Klein, 385 U.S. 511 (1967).

Thus, this Court held in *Spevack, supra,* that a lawyer's Fifth Amendment right against self-incrimination applies under the Fourteenth Amendment to State disciplinary proceedings. In *Spevack,* a case appealed to the Supreme Court

from the New York State Court of Appeals, an attorney was disbarred for asserting his right against self-incrimination. The Court of Appeals upheld the disbarment on the grounds of *Cohen v. Hurley,* 366 U.S. 117 (1961). *Cohen* held that the Fifth Amendment did not apply to the States under the Fourteenth Amendment, nor did it apply in these types of quasi-judicial proceedings. *Id.* In rendering the decision in *Spevack,* this Court expressly overruled *Cohen* saying:

> And so the question emerges whether the principle of *Malloy v. Hogan* is inapplicable because petitioner is a member of the Bar. We conclude that *Cohen v. Hurley* should be overruled, that the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it.

Spevack, at 514.

Pursuant to Title 18 U.S.C. Section 6003(a), a District Court is required to issue an order compelling an individual to testify in Court upon the request of the United States Attorney for such District. Once such an order is issued, Title 18 U.S.C. Section 6002 clothes the witness with use and derivative use immunity to prevent such testimony from being used against him in any subsequent "criminal case." Title 18 U.S.C. Sections 6002 and 6003(a). This Court has ruled that in order to compel a witness to testify over an assertion of the individual's right against self-incrimination, the immunity conferred must be at least as broad as the Fifth Amendment right. Thus, the

Court interpreted Section 6002 use immunity to be coextensive with the scope of the privilege against self-incrimination. *Kastigar v. United States*, 406 U.S. 411, *reh. den.*, 408 U.S. 931 (1972).

Subsequent to the Supreme Court's ruling in *Spevack, supra*, the New York State Court of Appeals and Appellate Divisions decided several cases clearly authorizing the reception into evidence, during a disciplinary proceeding against an attorney, of the attorney's compelled, immunized testimony from a prior proceeding. In all these cases, the witness gave up the privilege under threat of contempt, as did Appellant herein. *In re Klebanoff*, 21 N.Y.2d 920 (1968); *Anonymous Attorneys v. Bar Association of Erie County*, 41 N.Y.2d 506 (1977); *Matter of Ungar*, 27 A.D.2d 925, 282 N.Y.S.2d 158, *leave to appeal denied*, 20 N.Y.2d 642, *cert. denied*, 389 U.S. 1007 (1st Dep't, 1967); *In re Selig*, 32 A.D.2d 213, 302 N.Y.S.2d 94 (1st Dep't, 1969); *In re Epstein*, 37 A.D.2d 333, 325 N.Y.S.2d 657, *cert. denied*, 405 U.S. 1046 (1st Dep't, 1974). It is, however, the simple fact that this process will repeat itself at the Coyne trial that makes this appeal timely and not moot.

Since all of these cases involved situations where attorneys had *already* testified pursuant to a grant of immunity, none addressed the issue of whether a witness can be compelled, as will again occur here, to provide testimony which might expose him to subsequent disciplinary proceedings. In fact, in *Ungar*, Respondent expressly abandoned his reliance on his Fifth Amendment privilege against self-incrimination. The above-cited cases make it perfectly clear, however, that once the testimony is given, regardless of the extent of the immunity granted in the original proceeding, the testimony can be used in subsequent disciplinary proceedings as the rope that hangs its maker rendering any grant of immunity non-coextensive with the privilege.

In *Anonymous Attorneys, supra,* the New York State Court of Appeals stated that the Constitutional protection afforded by a grant of imunity extends only to the use of compelled testimony in criminal proceedings. The Court held disciplinary actions to be non-criminal proceedings. The opinion incorrectly interprets *Spevack* and similar Supreme Court decisions as simply standing for the notion that compelled testimony cannot be required in a disciplinary proceeding without granting immunity from use in subsequent criminal proceedings. Such immunity, the Court states, is coextensive with the Fifth Amendment and thus allows the use of the testimony in disciplinary proceedings.

Such an interpretation is inconsistent with *Spevack* and the cases upon which it rests, especially *Malloy, supra, Mapp v. Ohio,* 367 U.S. 643 (1961), and *Griffin v. California,* 380 U.S. 609 (1965). In *Spevack,* this Court cites *Griffin* for the proposition that "penalty" means any sanction that makes the assertion of the Fifth Amendment "costly." *Spevack,* at 515, *citing, Griffin, supra.* The Court holds disbarment to be just such a costly sanction. *Spevack,* at 516. In *Malloy,* the Justices state that ". . . any forcible and compulsory extortion of a man's own testimony . . . to be used as evidence . . . to forfeit his goods, is within the condemnation of [the Fourth, Fifth and Fourteenth Amendments] . . ." *Malloy,* at 15, *citing, Mapp v. Ohio, supra.*

Further, this Court ruled in *Spevack* that no adverse consequence such as disbarment in a State disciplinary proceeding can be imposed for invoking the Fifth Amendment privileges. Therefore, the New York Court of Appeals' decision in *Anonymous Attorneys v. Bar Association of County of Erie* rests on faulty and untenable logic, namely that disciplinary proceedings can be both criminal *and* civil for purposes of the Fifth and Fourteenth Amendments. As was well said by Professors Geoffrey C. Hazard and Cameron Beard of the Yale Law School:

> There is an anomaly, if not a contradiction, in holding that disciplinary proceedings are sufficiently "criminal" to preclude drawing adverse inferences from the accused's invocation of the privilege against self-incrimination, while also holding that they are sufficiently not "criminal" that disbarment may be imposed despite the accused's receipt of immunity.

96 Yale L.J. 1060, 1071 (1987).

The effect of "hybridizing" the disciplinary proceedings by a manipulation of the nature of the proceedings from civil to criminal to achieve a desired public policy result, *i.e.* policing the profession, gives rise to a truncation and dilution of the privilege against self-incrimination. A lawyer, or indeed any individual engaged in an occupation the pursuit of which can be withdrawn by state regulation, unlike any other witness or defendant, is thus required to choose between "pleading the Fifth" or relinquishing his Fifth Amendment privilege and automatically being subject to occupational discipline or loss of his livelihood. If the lawyer claims the privilege and is then granted immunity, the immunity is not coextensive with the privilege against self-incrimination since the lawyer is not protected against the loss of his property right to practice law, resulting from such testimony. Lawyers, purely by reason of their profession, should not be entitled to any less protection under the Fifth and Fourteenth Amendments than the public in general.

The New York Court of Appeals and the Appellate Divisions have held many times that a license to practice law or another profession is a property right. *See, O'Brien v. O'Brien,* 65 N.Y.2d 576 (1985); *Litman v. Litman,* 93 A.D.2d 695, 463 N.Y.S.2d 24, *aff'd,* 61 N.Y.2d 918 (2d Dep't, 1983). Yet, in the face of the above-cited precedent, especially *Spevack, Griffin,* and *Malloy,* the New York Courts continue to cling to their

narrow construction of these cases and apply them only in criminal proceedings. This narrow construction eliminates the protections afforded by testimonial immunity and exposes the attorney-witness to "costly" sanctions and forfeiture of property rights. Under this interpretation, testimonial immunity is no longer coextensive with the Fifth Amendment and is, therefore, unconstitutional. *Kastigar, supra.*

Further, pursuant to the New York construction, the District Court is not a competent authority to grant immunity under Section 6003 in a State disciplinary proceeding and is thus unable to compel the testimony of any attorney that might be used in a subsequent disciplinary proceeding.

Absent the testimony sought to be compelled in this action, the witness could invoke his Fifth and Fourteenth Amendment right to silence in a disciplinary proceeding.

If the witness testifies under an order of immunity, he has waived his Fifth Amendment and Fourteenth Amendment privilege. By invoking his Fifth and Fourteenth Amendment privilege, he has been held in contempt. It is not within traditional definitions of due process and liberty that such a choice is required.

III.

This Court should grant a stay pursuant to Title 28 U.S.C. Section 2101(f) of the criminal proceeding in *United States v. James J. Coyne, Jr.* in the United States District Court for the Northern District of New York

On March 19, 1992, Petitioner was served by the United States Attorney's Office for the Northern District of New York with a subpoena to give testimony in the trial of the *United States v. James J. Coyne, Jr.* This trial is scheduled to

commence on May 11, 1992 in the Northern District Courthouse in Albany, New York. The Petitioner will be called to testify to the same facts and transactions to which he testified at the Crozier trial during which the District Court issued the order which precipitated the appeals presented in this Petition.

The judgments and orders of the United States District Court for the Northern District of New York make it patently clear that absent a stay from this Court pending its review on certiorari of the questions herein presented, the Petitioner will be subjected to the same revolving door treatment he received during the instant trial and appeal process.

The December 6, 1991 judgment of the Honorable Con. G. Cholakis holding Title 18 immunity coextensive with Petitioner's Fifth and Fourteenth Amendment rights will render that issue *res judicata*. The Second Circuit will not grant leave to appeal until the Petitioner is held in contempt. Once the Court of Appeals grants leave to appeal, if they grant such leave, it will not stay the lower court proceedings, nor, apparently, will this Court. Thus, Petitioner will once again be compelled to abandon his Fifth and Fourteenth Amendment rights to avoid incarceration. Upon completing his testimony, the Government will make and the Court of Appeals will presumably grant a motion to dismiss on the ground of mootness.

Thus, the Petitioner will be twice deprived of his Constitutional rights without being given an appellate review on the merits.

The Petitioner was stripped of his Constitutional rights as an American citizen without appellate review in the Crozier trial. The Government seeks for a second time to take advantage of the testimonial revolving door created in the Crozier trial. In order to allow Petitioner the review to which he is

entitled when such important and basic rights are involved, this Court should stay the District Court proceedings pending its review on certiorari of the issues set forth in this Petition.

Conclusion

The Petitioner respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit, and grant Petitioner's request for a stay pending the outcome of this Court's certiorari review pursuant to Title 28 U.S.C. Section 2101(f).

Dated: April 21, 1992

Respectfully submitted,

HARVEY AND
HARVEY, HARVEY & MUMFORD
Attorneys for Witness-Petitioner

By: JONATHAN P. HARVEY
Federal Bar Roll Number 101933
29 Elk Street
Albany, NY 12207
(518) 463-4491

APPENDIX.

United States Court of Appeals for the Second Circuit
Order Dismissing Appeal dated January 24, 1992.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

USA

v.

CROZIER

ZUMBO,

Witness-Appellant

91-6302

MOTION BY:

DAVID R. HOMER
Assistant U.S. Attorney
Northern District of New York
James T. Foley U.S. Courthouse
Albany, New York 12207
518-472-5522

Has consent of opposing counsel:

A. been sought?	X Yes	
B. been obtained?		X No
Has service been effected?	X Yes	
Is oral argument desired?		X No

Requested return date: December 23, 1991

Has argument date of appeal been set:

A. by scheduling order?	X Yes	
B. by firm date of argument notice?		X No

OPPOSING COUNSEL:

JONATHAN P. HARVEY, ESQ.
Harvey, Harvey & Mumford
29 Elk Street
Albany, New York 12207
518-463-4491

Hon. Con. G. Cholakis, United States District Judge

Dismissal of appeal on the ground it is moot.

By:

David R. Homer December 13, 1991 X Plaintiff

IT IS HEREBY ORDERED that the motion be and it hereby is granted and the above entitled appeal is hereby dismissed.

ISSUED AS MANDATE. Jan. 28, 1992

A TRUE COPY
ELAINE B. GOLDSMITH, Clerk

Jan 24 1992

(illegible)
Richard J. Cardamone
Joseph M. McLaughlin
Circuit Judges

Filed Jan 24 1992
Elaine B. Goldsmith, Clerk
United States Court of Appeals
Second Circuit

United States District Court for the Northern District of New York Memorandum Decision and Order dated December 6, 1991.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

against

JOHN GREGORY CROZIER,

Defendant.

91-CR-284

Appearances:

Frederick J. Scullin, Jr., United States Attorney, Attorneys for Plaintiff, James T. Foley U.S. Court House, 445 Broadway, Albany, New York 12207.

Michael C. Magguilli, Esq., 151 Madison Avenue, Albany, New York 12201.

Raymond A. Kelly, Jr., Esq., 112 State Street, Albany, New York 12207.

Attorneys for Defendant.

Jonathan Harvey, Esq., Attorney for Joseph P. Zumbo, Subpoenaed Witness, 29 Elk Street, Albany, New York 12207.

Of Counsel:

George A. Yanthis, Esq.
Thomas Spina, Esq.

Con. G. Cholakis, D.J.

Memorandum Decision and Order

Subpoenaed witness Joseph V. Zumbo's motion for a protective order prohibiting his compelled testimony or, in the alternative, for an order denying the Government's application for an order compelling his testimony, pursuant to 18 U.S.C. §§ 6002 & 6003 is hereby denied.

Testimony immunized and compelled by order of this Court, under §§ 6002 & 6003, cannot be used in any subsequent federal or state criminal prosecution. *See In Re Grand Jury Proceedings,* 860 F.2d 11, 14-15 (2d Cir. 1988). Such immunity "leaves the witness . . . in substantially the same position as if the witness had claimed the Fifth Amendment privilege." *Kastigar v. United States,* 406 U.S. 441, 462, 92 S.Ct. 1653, 1666 (1972). Further, while Mr. Zumbo contends that such immunity may not prevent the use of his compelled testimony at a subsequent state court disbarment proceeding, such immunity is constitutionally sound: the Fifth Amendment to the Constitution, as applied to the States through the Fourteenth Amendment, does not prevent such an outcome.

In a case decided after, and in recognition of *Spevack v. Klein*, 385 U.S. 511, 87 S.Ct. 625 (1967), the New York State Court of Appeals stated that:

> The Fifth Amendment relates to self incrimination on charges of crime. Disciplinary proceedings for professional misconduct are civil in nature . . . [it] is not a criminal case. [There is] no privilege against making disclosure usable only in a disciplinary proceeding. The constitutional privilege applies only in the case of evidence which might be used . . . in a criminal case under the language of the Fifth Amendment.
>
> . . . *Spevack* [does not] confer[ ] upon them a constitutional privilege to withhold evidence which cannot lead to criminal prosecution and bears only upon [a] right to continue to practice law.

Zuckerman v. Greason, 20 N.Y.2d 430, 438, 285 N.Y.S.2d 1, 6 (1967), *cert. denied* 390 U.S. 925 (1968).

Therefore, any immunity granted to Mr. Zumbo, pursuant to §§ 6002 & 6003 is constitutionally sound, and affords the same protection as that of the Fifth Amendment to the Constitution.

IT IS SO ORDERED

CON. G. CHOLAKIS, JUDGE
United States District Court

DATED: Albany, New York
December 6, 1991

United States Court of Appeals for the Second Circuit Order Denying Motion for a Stay and a Protective Order dated December 9, 1991.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

UNITED STATES OF AMERICA,

Plaintiff,

against

JOHN GREGORY CROZIER,

Defendant.

91-6302

12/9/91

1. Faxed papers may be filed.

2. Motions for stay and protective order are *denied.* Validity of District Court's order may be tested on appeal from adjudication of contempt.

Jon O. Newman
U.S.C.J.

Filed Dec 9 1991
Elaine B. Goldsmith, Clerk
United States Court of Appeals
Second Circuit

United States District Court for the Northern District of New York Transcript containing oral Contempt Order dated December 9, 1991.

(21) tried to introduce somebody's grand jury testimony without me cross-examining it.

The Court: I think Mr. Harvey was talking about the Brown case of long, long ago.

Mr. Harvey: I'm old.

The Court: Not that old, Mr. Harvey.

Mr. Zumbo, the Government has asked for and received a grant of use immunity under Section 6002 and 6003 of Title 18 U.S. Code. In this Court's judgment, this use immunity is coextensive with the Fifth Amendment privilege you just asserted. I, therefore, say to you, sir, that the Fifth Amendment privilege is not available to you and you must testify. Will you answer the question?

The Witness: With all due respect, your Honor, I understand what the Court is saying and I will, pursuant to a direction by my attorney and on my own, assert my right to remain silent pursuant to the Fifth and Fourteenth Amendments of the Constitution of the United States, the Supreme Court cases pertaining thereto for all matters, civil and criminal.

The Court: Will you do so and continue to do so, Mr. Zumbo, with the knowledge that I am about to hold you in contempt of court and about to place you in custody?

The Witness: Yes, sir.

The Court: Anything else, gentlemen?

Mr. Yanthis: Your Honor, we would have an (22) application to be made if he continues to do that and wants—

The Court: He has just done it.

Mr. Yanthis: Okay.

The Court: I will do it this way, then.

Mr. Zumbo, answer the question at this time in the absence of the jury. Answer the questions to which you have claimed the Fifth in the absence of the jury.

Mr. Harvey.

Mr. Harvey: I am not sure I understand what—

The Court: I want to be sure he is going to continue the Fifth Amendment claim. So, I am directing him—I know that you think, but I want to know what he thinks.

Mr. Harvey: Yes, sir.

The Court: Do you have the first question?

The Court Reporter: I can find it.

By Mr. Yanthis:

Q. Mr. Zumbo, what jobs relating to Albany County did County Executive James Coyne assist you in obtaining?

A. Your Honor, once again, I am going to assert my right to remain silent pursuant to the Fifth and Fourteenth Amendments of the United States Constitution, the Supreme Court cases pertaining thereto for all purposes, civil and criminal.

The Court: I advise you, Mr. Zumbo, that the Fifth Amendment privilege is not available to you under the (23) circumstances of this case and direct you to answer the question.

The Witness: Your Honor, in all due respect, I must assert my Fifth Amendment and Fourteenth Amendment rights pursuant to the Constitution.

Mr. Yanthis: Our application at this time, your Honor, would be that this witness be held in civil contempt pursuant to Title 128 U.S. Code Section 1927 and that, I believe—

The Court: 26.

Mr. Yanthis: 26. I am sorry. And—

Mr. Harvey: I missed it.

The Court: 18 U.S. Code—28 U.S. Code 1826.

Mr. Yanthis: 26, recalcitrant witness, and that the Court order has immediate incarceration until he purges his contempt.

The Court: Anything else?

Mr. Yanthis: That's it, your Honor.

The Court: Mr. Harvey.

Mr. Harvey: Obviously, your Honor, I oppose that application and then I will speak when your Honor decides.

The Court: Mr. Zumbo, pursuant to 28 U.S. Code Section 1826, you are hereby held in contempt of this Court and you will be ordered placed in custody. However, I give you until Wednesday morning at 9:30 to purge yourself of (24) contempt.

The Witness: Thank you, your Honor.

The Court: Mr. Harvey.

Mr. Harvey: I want the record to reflect we will immediately file a notice of appeal from your Honor's order and that we will immediately fax to the United States Circuit Court of Appeals papers for an extradited appeal to either your Honor's order, in which event there will be no issue, otherwise we will be back in court Wednesday morning and events will unfold at that time. I thank your Honor for your consideration.

The Court: Anything else, gentlemen?

Mr. Zumbo, step down, sir.

(Witness excused.)

Mr. Harvey: May I have a copy of this transcript today, your Honor?

The Court: If you order it, you can have anything you want.

May I have the jury, please.

(Jury present.)

The Court: You are going to feel like I have got you on a string here. Ladies and gentlemen, I apologize for the delay and for the period of time you were in the jury room. However,

we will not be proceeding any further today. The case is going to be suspended until Wednesday (25) morning at 9:30 so you have the rest of today and tomorrow.

Please remember the admonitions which I have given you during the course of this trial. Be back here Wednesday morning at 9:30. I hope you have a pleasant day and a half. You are excused.

(Jury excused.)

The Court: All right, gentlemen, Wednesday morning.

Mr. Yanthis: Thank you, your Honor.

Mr. Kelly: Your Honor, if I may just—I want to make sure that the record is clear that I had a motion to strike all that testimony and I had a motion for a mistrial in relationship to this being done in the presence of the jury.

The Court: I think the record is clear. The motion has been denied.

(Court adjourned at 11:45 AM)

* * *

Certification:

I, THERESA J. BERICAL, CSR, RPR, United States Court Reporter in and for the United States District Court, Northern District of New York, do hereby certify that I attended at the time and place set forth in the heading hereof; that I did make a stenographic record of the proceedings had in this matter and cause the same to be transcribed; that the foregoing is a true and correct copy of the same and the whole thereof.

Theresa J. Berical
Dec. 9, 1991

United States Court of Appeals for the Second Circuit Order Granting Expedited Appeal and Denying Stay dated December 10, 1991.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of December, one thousand nine hundred and ninety-one.

Present: Honorable Wilfred Feinberg,
Honorable Jon O. Newman,
Honorable Richard J. Cardamone,
Circuit Judges.

UNITED STATES OF AMERICA,

v. *Plaintiff,*

JOHN GREGORY CROZIER,

Defendant,

JOSEPH V. ZUMBO,

Appellant-Witness.

91-6302

ORDER

Upon consideration of the motion of the appellant-witness for a stay of the District Court's order of December 9, 1991,

holding him in contempt, and for a stay or reversal of the District Court's order denying a protective order, and for an expedited appeal, it is hereby Ordered that the faxed motion papers may be filed, and the motion for a stay is denied, the motion for a stay or reversal of the denial of the protective order is denied, and the motion to expedite the appeal is granted. Appellant's brief shall be filed by December 20, 1991; appellee's brief shall be filed by January 3, 1992; appellant may file a reply brief by January 8, 1992, and the appeal will be scheduled for oral argument during the week of January 13, 1992, or as soon thereafter as the Court's schedule permits.

WILFRED FEINBERG
JON O. NEWMAN
RICHARD J. CARDAMONE
Circuit Judges.

Filed Dec 10 1991
Elaine B. Goldsmith, Clerk
United States Court of Appeals
Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of December, one thousand nine hundred and ninety-one.

Present: Honorable Wilfred Feinberg,
Honorable Jon O. Newman,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GREGORY CROZIER,

Defendant,

JOSEPH V. ZUMBO,

Appellant-Witness.

91-6302

ORDER

By Order entered earlier this date, this Court denied appellant's motion for a stay of the contempt order entered by the

ORDER

By Order entered earlier this date, this Court denied appellant's motion for a stay of the contempt order entered by the District Court. The stay had been requested pending an appeal of the District Court's order to this Court. Appellant has now moved for a stay of the District Court's order, pending an application for a stay to be submitted to Justice Clarence Thomas, as Circuit Justice for the Second Circuit.

Upon consideration of appellant's motion, the motion is denied.

WILFRED FEINBERG
JON O. NEWMAN
Circuit Judges.

Filed Dec 10 1991
Elaine B. Goldsmith, Clerk
United States Court of Appeals
Second Circuit

Supreme Court of the United States Order Denying Stay dated December 11, 1991

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

December 11, 1991

Mr. Jonathan P. Harvey
Twenty-Nine Elk Street
Albany, NY 12207

Re: Joseph V. Zumbo,
v. United States, et al.
Application No. A-415

Dear Mr. Harvey:

The application for a stay of enforcement of contempt order of the U.S. District Court for the Northern District of New York in the above-entitled case has been presented to Justice Thomas, who on December 11, 1991 endorsed thereon the following:

"12/11/91
Deny
Clarence Thomas"

Very truly yours,

WILLIAM K. SUTER, Clerk

By Francis J. Lorson
Chief Deputy Clerk

NOTE - FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

NOTIFICATION LIST

Mr. Jonathan P. Harvey
Twenty-Nine Elk Street
Albany, NY 12207

Mr. Kenneth W. Starr
Solicitor General
U.S. Department of Justice
Washington, DC 20530

United States District Court for the Northern District of New York Order Granting Immunity Pursuant to Title 18 U.S.C. Section 6002 and Sealing Order dated November 27, 1991.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

U.S. v. JOHN GREGORY CROZIER

Cr. No. 91-CR-284

IN RE: JOSEPH V. ZUMBO, A Witness Before The Petit Jury

On the motion of Frederick J. Scullin, Jr., United States Attorney for the Northern District of New York, by George A. Yanthis, Assistant U.S. Attorney, and it appearing to the satisfaction of the court:

1. That JOSEPH V. ZUMBO has been called to testify or provide other information before the Petit Jury of the United States presently empaneled within this District; and

2. That in the judgment of the said United States Attorney, said JOSEPH V. ZUMBO may refuse to testify or provide other information on the basis of his privilege against self incrimination; and

3. That in the judgment of the said United States Attorney, the testimony or other information from said JOSEPH V. ZUMBO may be necessary to the public interest; and

4. That the aforesaid Motion filed herein has been made with the approval of the Assistant Attorney General in charge of the Criminal Division of the Department of Justice, pursuant to the authority vested in him by 18 U.S.C. 6003(b) and 28 C.F.R. 0.175(a);

NOW, THEREFORE, IT IS ORDERED, pursuant to 18 U.S.C. § 6002 that the said JOSEPH V. ZUMBO give testimony or provide other information he refuses to give or to provide on the basis of his privilege of self incrimination as to all matters about which he may be interrogated before said Petit Jury.

This order shall become effective only if after the date of the order the said JOSEPH V. ZUMBO refuses to testify or provide other information on the basis of his privilege against self incrimination.

DATED: November 27, 1991
Albany, New York

CON. G. CHOLAKIS
U.S. District Judge

Filed Nov 27 1991
George A. Ray, Clerk
U.S. District Court
N.D. of N.Y.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

U.S. v. JOHN GREGORY CROZIER

Cr. No. 91-CR-284

Now, on motion of the United States of America by its attorney, Frederick J. Scullin, Jr., United States Attorney for the Northern District of New York, George A. Yanthis, Assistant United States Attorney, of counsel, it is hereby

ORDERED, that the Order Granting Immunity Pursuant to Title 18 U.S.C. § 6002 concerning JOSEPH V. ZUMBO regarding the above captioned matter and this order are SEALED until further order of this Court.

DATED: November 27, 1991
Albany, New York

CON. G. CHOLAKIS
United States District Judge

Filed Dec 9 1991
George A. Ray, Clerk
U.S. District Court
N.D. of N.Y.

United States District Court for the Northern District of New York Motion for Protective Order dated December 5, 1991

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

against

JOHN GREGORY CROZIER,

Defendant.

91-CR-284
CGC

TO: HON. FREDERICK J. SCULLIN, JR.
United States Attorney
Northern District of New York
By: GEORGE A. YANTHIS
Assistant U.S. Attorney
Broadway and Maiden Lane
Albany, New York 12207-2924

Pursuant to Rule 17 of the Federal Rules of Criminal Procedure, the subpoenaed witness, JOSEPH V. ZUMBO, through his attorneys, Harvey and Harvey, Harvey & Mumford, moves this Court for a protective order prohibiting the

compelled testimony of the witness, or in the alternative denying the application of the U.S. Attorney for an order compelling the testimony of subpoenaed witness Joseph V. Zumbo under Title 18 U.S.C. §6002 and §6003 on the ground that such compelled testimony of this lawyer witness would violate Article V and Article XIV, Section 1, of the Articles in Addition to, and Amendment of, the Constitution of the United States of America.

Dated: December 5, 1991

Respectfully submitted,

HARVEY AND
HARVEY, HARVEY & MUMFORD

By: JONATHAN P. HARVEY, Esq.
Federal Bar Roll No. 101-933
Office and P.O. Address
29 Elk Street
Albany, NY 12207
Tel.: (518) 463-4491

United States District Court for the Northern District of New York Notice of Appeal dated December 9, 1991

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

against

JOHN GREGORY CROZIER,

Defendant.

91-CR-284 CGC

TO: HON. FREDERICK J. SCULLIN, JR.
United States Attorney
Northern District of New York
By: GEORGE A. YANTHIS
Assistant United States Attorney
Broadway and Maiden Lane
Albany, New York 12207-2924

Notice is hereby given that JOSEPH V. ZUMBO, a subpoenaed witness in the above-entitled proceeding, hereby appeals to the United States Court of Appeals for the Second Circuit, from the Memorandum Decision and Order denying the witness' motion for a protective order, entered in this action on the 6th day of December, 1991, and from this Court's order

compelling the witness ZUMBO'S testimony herein, dated the 27th day of November, 1991, and from each and every part thereof, and from this courts order holding the witness Joseph V. Zumbo in contempt pursuant to Title 28 USC 1826.

HARVEY AND
HARVEY, HARVEY & MUMFORD
Attorneys for JOSEPH V. ZUMBO

By: JONATHAN P. HARVEY, Esq.
Federal Bar Roll Number 101933
Office and Post Office Address
29 Elk Street
Albany, NY 12207
(518) 463-4491

Filed Dec 9 1991
George A. Ray, Clerk Albany
U.S. District Court N.D. of N.Y.

United States Court of Appeals for the Second Circuit Notice of Motion to Dismiss Appeal Dated December 13, 1991

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

USA

v.

CROZIER

ZUMBO,

Witness-Appellant

91-6302

MOTION BY:

DAVID R. HOMER
Assistant U.S. Attorney
Northern District of New York
James T. Foley U.S. Courthouse
Albany, New York 12207
518-472-5522

Has consent of opposing counsel:

A. been sought?	X Yes	
B. been obtained?		X No
Has service been effected?	X Yes	
Is oral argument desired?		X No

Requested return date: December 23, 1991

Has argument date of appeal been set:

A. by scheduling order?	X Yes	
B. by firm date of argument notice?		X No

OPPOSING COUNSEL:

JONATHAN P. HARVEY, ESQ.
Harvey, Harvey & Mumford
29 Elk Street
Albany, New York 12207
518-463-4491

Hon. Con. G. Cholakis, United States District Judge

Dismissal of appeal on the ground it is moot.

By:

David R. Homer December 13, 1991 X Plaintiff

Appellant Zumbo applied for a stay of the District Court's order of contempt which was denied by order of this Court on December 10, 1991. On December 11, 1991, this Court denied appellant Zumbo's request for a stay of the contempt order to permit time for an application to the Supreme Court. Also on December 11, 1991, Justice Clarence Thomas, United States

Supreme Court, denied appellant Zumbo's application for a stay of the District Court's order of contempt.

Should this appeal be dismissed as moot?

On December 9, 1991, appellant Zumbo was called to testify at the criminal trial of *United States v. Crozier.* Appellant Zumbo refused to answer questions after being granted statutory immunity. Appellant Zumbo was directed by the District Court to answer questions, refused, and was held in contempt. Applications for stays to the District Court, this Court, and the Supreme Court were denied on December 10 and 11, 1991. On December 11, 1991, appellant Zumbo thereupon resumed the witness stand at trial, completing his testimony on December 12, 1991, and thereby purging himself of his contempt. Affidavit at paragraphs 4-8.

Appellant Zumbo has filed this appeal from a District Court order holding him in contempt for refusing to answer questions as a witness at a pending trial. Appellant Zumbo has now purged himself of that contempt by testifying at the trial. Therefore, the issue presented by this appeal is now moot and the appeal should be dismissed. Memorandum of Law at pages 1-2.

United States District Court for the Northern District of New York Subpoena in a Criminal Case dated March 16, 1992.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

JAMES J. COYNE, JR.

91-CR-209

TO: JOSEPH ZUMBO
9 Van Buren Street
Albany, New York

YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

Place: UNITED STATES DISTRICT COURT
Northern District of New York
James T. Foley U.S. Courthouse
445 Broadway
Albany, New York 12207

Courtroom: 4th Floor

Date and Time: May 11, 1992
9:00 a.m.

Date: March 16, 1992

U.S. MAGISTRATE JUDGE OR
CLERK OF COURT
GEORGE A. RAY

(By) Deputy Clerk
CATHLEEN G. MILES

ATTORNEY'S NAME, ADDRESS
AND PHONE NUMBER:
GEORGE A. YANTHIS
Assistant U.S. Attorney
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